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No. 80-1569

In the Supreme Court of the United States

OCTOBER TERM, 1980

SNELLEN M. JOHNSON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the delay between the time of the offense and the time of the indictment deprived petitioner of due process of law.

2. Whether the government may introduce the grand jury testimony of a deceased individual to impeach or rebut testimony of defense witnesses concerning statements allegedly made by that individual.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A3-A12) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on December 29, 1980. A petition for rehearing was denied on January 14, 1981. The petition for a writ of certiorari was filed on March 13, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the District of Utah, petitioner was convicted on six counts of making false statements on loan applications to a federally insured bank, in violation of 18 U.S.C. 1014 and 2 (Pet. App. A4). He was sentenced to concurrent terms of two years' imprisonment on each count. The court of appeals affirmed (Pet. App. A3-A12).

1. The evidence showed that in 1974 and 1975 petitioner was president and major stockholder of International Resources, the holding company for two other companies operated by petitioner (Tr. 569-570, 811, 903). International Resources did not have a solid financial base(Tr. 571). Because of the company's precarious financial condition, petitioner approached Stephen Summers, a loan officer at Commercial Security Bank in Murray, Utah, to discuss the possibility of obtaining a loan for International Resources (Tr. 176, 822-823). Summers did not have the authority to make a single loan in the amount sought, but he indicated that he could probably make several smaller loans to individuals if the loans were fully collateralized (Tr. 178-181). Additionally, Summers stated that the individuals who signed for the loans had to qualify and that the collateral had to be in the names of the individuals and to be free of any encumbrances (Tr. 181, 184).

Subsequently, petitioner gave Summers two lists containing an inventory of equipment from the Kearns and Aitken ranches in Winnemucca, Nevada, which petitioner represented he had just purchased (Tr. 201-202, 207). The Kearns ranch was actually leased at the time by Ven Savage and Arthur Sant,

who began the process of purchasing the property under a lease-purchase agreement in the spring of 1975 (Tr. 518-520). Sant and Savage had considered selling the ranch to International Resources. As part of the negotiations, Savage listed the ranch equipment as a preparatory step to the drafting of a sales contract (Tr. 522, 528-531). This list was the same as the one that petitioner gave to Summers (Tr. 529-531). International Resources never purchased the Kearns ranch, and Sant never gave permission for any of the equipment to be pledged as collateral (Tr. 532-533, 780). Savage also had previously given petitioner an inventory list of the equipment on the Aitken ranch.[1]

In addition to furnishing Summers the two inventory lists, petitioner, together with his brother, Lyle Johnson, and an associate, Clark Oborn, arranged for several individuals to sign for loans (Tr. 195). Loans were in fact made, with these individuals as the named payees and with equipment from the ranch inventory lists serving as collateral (Tr. 221-222, 227-232, 248-249, 271-272, 294-295). Rather than going to the named borrowers, the loan proceeds inured to the benefit of petitioner or his companies, primarily by being used to fund cashiers' checks previously issued without funding (Supp. Tr.

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[1] Savage and Sant had also considered purchasing the neighboring Aitken ranch (Tr. 552-553). In conjunction with this transaction, Savage made a list of the equipment on the Aitken ranch, for the purpose of arranging financing (Tr. 555). This list of equipment was also given to Summers as a description of collateral on the loans. However, no sale was ever made, and John Aitken, the owner, did not give permission for any of the ranch equipment to be pledged as collateral (Tr. 551).

49; Tr. 74-75, 223-224, 234-235, 257-259, 270, 273-276, 294-295, 615-616).[2]

2. The indictment was returned on April 27, 1979 (Pet. App. A4). Three days prior to a rescheduled trial date of August 27, 1979, petitioner moved to dismiss the indictment on the basis of prejudicial pre-indictment delay (*id.* at A4-A5). Petitioner alleged, *inter alia*, that as a result of the delay he had lost a crucial defense witness, Ven Savage, who had died approximately one month prior to trial, and that the memories of some of the witnesses had dimmed. Following an evidentiary hearing on the matter, the motion was denied. The district court concluded that there had been no showing of a deliberate delay by the government to gain a tactical advantage and that petitioner failed to establish actual prejudice to his case (Pet. App. A5-A7; Pet. 13-14).

ARGUMENT

1. Petitioner contends (Pet. 11-35) that the court of appeals erred in affirming the district court's denial of his motion to dismiss the indictment—a motion predicated on the delay of approximately four years between the commission of the offenses and the return of the indictment. This claim is without legal or factual support.

The charged offenses in this case took place sometime between January and July of 1975. Thereafter, the FBI conducted an investigation; by October 1975, the FBI had discovered only the possibility of irregularities in connection with certain loans. A 200-page report—the result of a "thorough investiga-

[2] "Supp. Tr." refers to the transcript of a portion of the trial held on Sept. 19, 1979, which is separately paginated.

tion"—was submitted to the United States Attorney's office on February 20, 1979 (Pet. 7-8; Pet. App. A5).[3] The indictment was returned on April 27, 1979, which was within the five-year statute of limitations. The case was originally scheduled for trial on July 9, 1979, but petitioner sought a continuance that resulted in rescheduling of the trial for August 27, 1979. On August 14, 1979, Ven Savage died suddenly of a heart attack (Pet. 9).

In affirming the district court's denial of petitioner's motion to dismiss for pre-indictment delay, the court of appeals stated that petitioner "failed to establish prejudice resulting from delay" (Pet. App. A5-A6) and that even assuming that the delay had resulted in some prejudice, there was no showing that the delay was anything other than good faith " 'investigative delay' " (Pet. App. A6-A7, quoting *United States* v. *Lovasco*, 431 U.S. 783, 796 (1977)). This holding is consistent with this Court's decisions in *United States* v. *Lovasco*, *supra*, and *United States* v. *Marion*, 404 U.S. 307 (1971), and it does not conflict with decisions of any other court of appeals.[4]

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[3] The FBI investigated approximately 18 persons who had signed for loans, 22 actual loans, 11 floating cashier's checks, and 25 separate pieces of collateral, which were located in Utah, Nevada, and Montana.

[4] Although the Tenth Circuit does not phrase its test in precisely the terms used by courts of appeals in other circuits (see cases cited at Pet. 20-22), the standards are consistent. All of the courts of appeals consider the same factors—actual prejudice and reasons for delay. Given the insufficient showing of prejudice in this case and the government's explanation of the delay (see page 7, *infra*), there is no basis for concluding that petitioner would have fared better in another circuit. We note that in none of the decisions from other circuits on which petitioner relies (Pet. 20-22) did the court find a violation of the Due Process Clause.

Lovasco and *Marion* establish that a due process violation is not made out absent a showing of prejudice resulting from the delay and that even where some prejudice is shown, a violation will not be found where there is no showing that "delay was an intentional device to gain tactical advantage over the accused" (*United States* v. *Marion*, *supra*, 404 U.S. at 324) or that the government's reasons for the delay otherwise violate "those 'fundamental conceptions of justice which lie at the base of our civil and political instiutions,' *Mooney* v. *Holohan*, 294 U.S. 103, 112 (1935)" (*United States* v. *Lovasco*, *supra*, 431 U.S. at 790).

Here, petitioner's only particularized claim of prejudice relates to the deceased witness, Ven Savage, and that claim is clearly insufficient to satisfy this prong of the due process test.[5] Relying on an affidavit of his trial attorney and on testimony of Clark Oborn, one of his associates, regarding a pretrial interview with Savage, petitioner contends (Pet. 27-29) that Savage would have testified that he had given petitioner permission to pledge the ranch equipment as collateral. But it is speculative indeed to assume that Savage, whom the government was planning to use as its trial witness, would, at trial, have contradicted his sworn testimony before the grand jury that he had *not* given petitioner permission to make such use of the equipment. In view of Savage's

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[5] Petitioner makes a bald allegation that memories have dimmed as a result of the delay, without specifically stating which witnesses were thus affected and what testimony favorable to petitioner they might otherwise have given. Such bare claims are insufficient to establish actual prejudice. See *United States* v. *Marion*, *supra*, 404 U.S. at 325-326. Petitioner's claims respecting lost documents are similarly infirm because of his failure to explain what such documents might have shown in aid of his defense.

failure to communicate to the government any such contemplated change of testimony, this claim is too slender a reed on which to rest a finding of actual prejudice to the defense.[6]

Even assuming that some prejudice was established, the courts below were nevertheless correct in finding no violation of due process. The government came forward with explanations for the delay, offering one of the FBI investigators as a witness at the evidentiary hearing (Pet. App. A5). As noted above, investigation of the case required tracking down a number of bank transactions and items pledged as collateral and tracing the connections between them. The indictment was returned in little more than two months after the prosecutor received the FBI's 200-page report on the matter, and the government proceeded expeditiously thereafter. Indeed, had petitioner himself not successfully moved for a continuance of the trial, originally scheduled for July 9, 1979, Savage would have been able to testify as a trial witness, since his fatal heart attack did not occur until August 14. In sum, it is clear that the government did not delay the case in order to gain any tactical advantage over petitioner with respect to Savage's testimony, that there was "nothing sinister" generally with respect to the government's investigation of the case (*United States* v. *Lai Ming Tanu*,

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[6] It is also noteworthy that, according to Oborn's account (Tr. 1052), Savage's purported repudiation of his grand jury testimony in his interview with petitioner's trial counsel was quite equivocal. Oborn testified (Tr. 1052) that Savage stated that he had "forgotten" to tell the grand jury that he had given petitioner the "opportunity to use that collateral" and that if he "hadn't given" petitioner such an opportunity, then "he would give it."

589 F.2d 82, 89 (2d Cir. 1978)), and that, under all the circumstances, the delay was not oppressive government action constituting a violation of petitioner's rights to due process.

2. Petitioner also contends (Pet. 35-65) that the district court erred in admitting Savage's grand jury testimony into evidence. In particular, he argues that the testimony was hearsay of insufficient reliability to warrant admission. The court of appeals properly rejected this claim (Pet. App. A7-A10).

As part of the defense case, petitioner's business associate, Clark Oborn, testified (Tr. 741-742) that petitioner—in Savage's presence—had stated that Savage would allow International Resources to use equipment on his ranch as loan collateral; and petitioner testified (Tr. 827-828) that Savage had given such permission.[7] The government objected to

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[7] As petitioner indicates (Pet. 43), loan officer Stephen Summers testified (Tr. 271-273, 279-285) that he had received some serial numbers for the ranch equipment from Savage and had stated in Savage's presence that it was essential that the equipment be free and clear so as to be usable as loan collateral. Summers later qualified that testimony, however, by testifying (Tr. 293, 360-361) that he believed Savage was obtaining the serial numbers simply because he knew people on the ranches, not because he had any interest in the equipment, and that Summers was not sure that he had specifically mentioned loans in Savage's presence, although he had stated that the equipment had to be "free and clear." Even more significantly, Summers testified (Tr. 187-188, 191, 201-202, 291, 362-363) that petitioner's representation to him was not that Savage had given petitioner permission to use the ranch equipment as collateral but that petitioner's company had purchased both the Aitken and Kearns ranches and owned the equipment as well. Furthermore, the loan collateral consisted of equipment from both the Kearns ranch that Savage

the introduction of any testimony concerning Savage's alleged statements or his agreement with statements allegedly made in his presence, pointing out that, if it were introduced, the government would want to impeach the testimony by use of Savage's contrary grand jury testimony (Tr. 729-740). The trial court ruled that defense testimony along the indicated lines would be admissible hearsay, pursuant to Fed. R. Evid. 804(b)(3), because it was contrary to Savage's pecuniary interest, to the extent of his equity in the ranch equipment (Tr. 734-739). The government, on rebuttal, did subsequently introduce Savage's grand jury testimony (Tr. 1041-1050) in order to impeach the testimony of petitioner and Oborn. The defense was then permitted to present Oborn's testimony that Savage had repudiated his statements to the grand jury (see note 6, *supra*). In agreeing to admit the grand jury testimony, the trial court noted (Tr. 1019-1020) that the defense had been permitted, under an exception to the hearsay rules, to introduce testimony concerning statements allegedly made by Savage and that the prosecution should be permitted in rebuttal to introduce Savage's statements to the grand jury as long as there were "some guarantees of trustworthiness."

We do not concede that the trial court erred in its judgment of the trustworthiness of Savage's statements made under oath to the grand jury or that admission of those statements was contrary to the Confrontation Clause of the Sixth Amendment or to

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and Sant purchased and the Aitken ranch, which neither they nor petitioner at any time owned (see note 1, *supra*). (Petitioner's reference (Pet. 57) to "Trial P. 1170" as reflecting contradictory testimony by Summers may be a misprint, since the last page of trial testimony is numbered 1054.)

Fed. R. Evid. 804(b)(5), the so-called catch-all provision for exceptions to the general bar against hearsay. In any event, contrary to petitioner's suggestion (Pet. 35-36), this is not an appropriate case in which to review the application of the Confrontation Clause to the grand jury testimony of unavailable witnesses or to "define the scope, meaning and proper application" of Rule 804(b)(5). There is no conflict among the circuits created or perpetuated by the decision below. The cases on which petitioner relies all concern the use of such testimony in the government's case in chief. None resembles the unusual situation here, in which the government and the defense each asserted that the unavailable witness would support its case, and the government introduced the grand jury testimony in rebuttal only after the defense had introduced other evidence of inconsistent statements allegedly made by the deceased witness. Here the testimony was properly used in the nature of impeachment. As the court of appeals noted (Pet. App. A9), "[i]f Savage had himself testified that he had previously given Johnson permission to pledge the property in question as collateral for the various loans, it would have been perfectly proper for the Government to show, by way of rebuttal," that Savage had testified to the contrary; and "it would seem odd that Savage's testimony before the Grand Jury becomes inadmissible when the defense has interjected the same issue into the case, i.e. permission or non-permission" by way of defense witnesses' testimony concerning Savage's alleged statements. The case therefore comes within the general principle that "impeachment to demonstrate the untruth of a witness' testimony is not excludable as hearsay because it is not offered pri-

marily to prove the truth of the matter asserted, but to contradict the prior testimony." *United States* v. *Winkle*, 587 F.2d 705, 710 (5th Cir. 1979); Fed. R. Evid. 801(c).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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